

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS BURDSAL,

Plaintiff,

vs.

ALEXANDER SEVIER, et al.,

Defendants.

3:11-cv-00780-LRH-VPC

ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections, filed a complaint in state court which defendants have removed. It appears from the documents and the removal statement that removal to federal court was proper. The court has screened plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A.

I. Screening Pursuant to 28 U.S.C. § 1915A

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

1 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation
2 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of
3 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may
4 be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
5 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is
6 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
7 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses
8 a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions
9 as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could
10 not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

11 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
12 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim
13 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that
14 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making
15 this determination, the court takes as true all allegations of material fact stated in the complaint, and the
16 court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d
17 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
18 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404
19 U.S. 519, 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed
20 factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp.*
21 *v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
22 insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

23 Additionally, a reviewing court should "begin by identifying pleadings [allegations] that,
24 because they are no more than mere conclusions, are not entitled to the assumption of truth." *Ashcroft*
25 *v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). "While legal conclusions can provide the framework of a
26 complaint, they must be supported with factual allegations." *Id.* "When there are well-pleaded factual
27 allegations, a court should assume their veracity and then determine whether they plausibly give rise to

1 an entitlement to relief. *Id.* “Determining whether a complaint states a plausible claim for relief [is] a
2 context-specific task that requires the reviewing court to draw on its judicial experience and common
3 sense.” *Id.*

4 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua*
5 *sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based
6 on legal conclusions that are untenable (e.g., claims against defendants who are immune from suit or
7 claims of infringement of a legal interest which clearly does not exist), as well as claims based on
8 fanciful factual allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S.
9 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

10 **II. Screening of the Complaint**

11 Plaintiff alleges that on October 1, 2010, he was falsely imprisoned and beaten and kicked
12 by defendant Sevier, a mentally ill inmate known to be belligerent, confrontational, and threatening,
13 while he was incarcerated at the Lovelock Correctional Center. He further alleges that the various other
14 defendants failed to perform their duties as correctional officers or supervisors, thereby permitting the
15 assault and battery on plaintiff. Plaintiff contends that the battery resulted in serious injuries including
16 a broken jaw and injuries to his shoulder. He claims violations of his constitutional and statutory rights
17 under federal and state law.

18 The facts, as alleged in the complaint properly state colorable claims for failure to protect
19 the plaintiff inmate from a known risk of harm. As alleged, defendant Cox failed to train his employees
20 to recognize and take proper action in the face of dangerous, belligerent, confrontational, psychotic
21 inmates who threaten harm to others. Additionally, defendants Harkreader and Bohan allegedly failed
22 to recognize and take action based on Sevier’s irrational and threatening behavior. Defendant Mitchell,
23 due to a lack of proper training and supervision, allegedly failed to discharge his custodial duties to
24 follow orders and established safety and security procedures, including regular and frequent security
25 patrols to ensure compliance with rules and procedures by inmates within his assigned duty post. *See,*
26 *Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Simmons v. Navajo County*, 609 F.3d 1011, 1017 (9th
27 Cir. 2010).

1 Plaintiff also names the State of Nevada *ex rel.* the Nevada Department of Corrections
2 (NDOC) as a defendant. While a governmental agency which is an arm of the State is not a person for
3 purposes of § 1983, *See Howlett v. Rose*, 496 U.S. 356, 365 (1990), plaintiff raises state law claims and
4 the complaint indicates that the State is named as a necessary party under Nevada law, NRS 41.031.
5 This statute waives the State's Eleventh Amendment immunity if certain conditions are accepted by the
6 plaintiff. It is noted that this action originated in state court, but was removed by the defendants. Thus,
7 considering these facts and relief sought by the plaintiff, it appears that the naming of the State of
8 Nevada in its relation to the NDOC was proper.

9 **III. Conclusion**

10 Plaintiff has stated sufficient facts to proceed on the claims presented against the
11 defendants as named.

12 **IT IS THEREFORE ORDERED** that the Clerk shall detach and file the Complaint
13 attached as Exhibit B to the Petition for Removal.

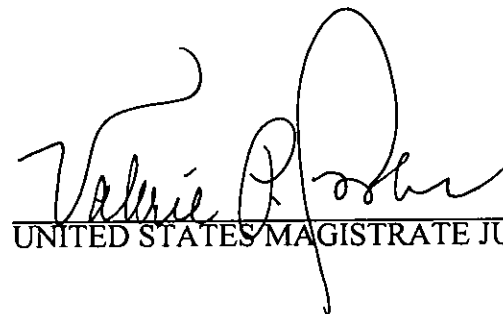
14 **IT IS FURTHER ORDERED** as follows:

- 15 1. Given the nature of the claims that the court has permitted to proceed, this action is
16 **STAYED** for ninety (90) days to allow plaintiff and defendant(s) an opportunity to settle
17 their dispute before an answer is filed or the discovery process begins. During this
18 ninety-day stay period, no other pleadings or papers shall be filed in this case, and the
19 parties shall not engage in any discovery. The court will decide whether this case will
20 be referred to the court's Inmate Early Mediation Program, and the court will enter a
21 subsequent order. Regardless, on or before ninety (90) days from the date this order is
22 entered, the Office of the Attorney General shall file the report form attached to this
23 order regarding the results of the 90-day stay, even if a stipulation for dismissal is entered
24 prior the end of the 90-day stay. If the parties proceed with this action, the court will
25 then issue an order setting a date for the defendants to file an answer or other response.
26 Following the filing of an answer, the court will issue a scheduling order setting
27 discovery and dispositive motion deadlines.

2. "Settlement" may or may not include payment of money damages. It also may or may not include an agreement to resolve plaintiff's issues differently. A compromise agreement is one in which neither party is completely satisfied with the result, but both have given something up and both have obtained something in return.
3. The Clerk shall electronically **SERVE** a copy of this order and a copy of plaintiff's complaint on the Office of the Attorney General of the State of Nevada, attention Pamela Sharp.
4. The Attorney General's Office shall advise the Court within twenty-one (21) days of the date of the entry of this order whether it will enter a limited notice of appearance on behalf of the defendants for the purpose of settlement. No defenses or objections, including lack of service, shall be waived as a result of the filing of the limited notice of appearance.

IT IS SO ORDERED.

DATED: November 28, 2011.


UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

	,	3:00-CV-0000-____ (____)
Plaintiffs,	}	
vs.	}	REPORT OF THE OFFICE OF THE
	}	ATTORNEY GENERAL RE:
	}	RESULTS OF THE 90-DAY STAY
, et al.,	}	
Defendants.	}	

**NOTE: ONLY THE OFFICE OF THE ATTORNEY GENERAL SHALL FILE THIS FORM.
THE INMATE PLAINTIFF SHALL NOT FILE THIS FORM.**

On _____ [*the date of the issuance of the screening order*], the Court issued its screening order stating that it had conducted its screening pursuant to 28 U.S.C. § 1915A, and that certain specified claims in this case would proceed. The court ordered the Office of the Attorney General of the State of Nevada to file a report ninety (90) days after the date of the entry of the court's screening order to indicate the status of the case at the end of the 90-day stay. By filing this form, the Office of the Attorney General hereby complies.

REPORT FORM

[Identify which of the following two situations (identified in bold type) describes the case, and follow the instructions corresponding to the proper statement.]

Situation One: Mediated Case: The case was assigned to mediation by a court-appointed mediator during the 90-day stay. [If this statement is accurate, check ONE of the six statements below and fill in any additional information as required, then proceed to the signature bloc.]

_____ A mediation session with a court-appointed mediator was held on _____ [enter date], and as of this date, the parties have reached a settlement (*even if paperwork to memorialize the settlement remains to be completed*). (*If this box is checked, the parties are on notice that they must SEPARATELY file either a contemporaneous stipulation of dismissal or a motion requesting that the court continue the stay in the case until a specified date upon which they will file a stipulation of dismissal.*)

_____ A mediation session with a court-appointed mediator was held on _____ [enter date], and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the court of its intent to proceed with this action.

_____ No mediation session with a court-appointed mediator was held during the 90-day stay, but the parties have nevertheless settled the case. (*If this box is checked, the parties are on notice that they must SEPARATELY file a contemporaneous stipulation of dismissal or a motion requesting that the court continue the stay in this case until a specified date upon which they will file a stipulation of dismissal.*)

_____ No mediation session with a court-appointed mediator was held during the 90-day stay, but one is currently scheduled for _____ [enter date].

_____ No mediation session with a court-appointed mediator was held during the 90-day stay, and as of this date, no date certain has been scheduled for such a session.

_____ None of the above five statements describes the status of this case. Contemporaneously with the filing of this report, the Office of the Attorney General of the State of Nevada is filing a separate document detailing the status of this case.

* * * * *

Situation Two: Informal Settlement Discussions Case: The case was NOT assigned to mediation with a court-appointed mediator during the 90-day stay; rather, the parties were encouraged to engage in informal settlement negotiations. [If this statement is accurate, check ONE of the four statements below and fill in any additional information as required, then proceed to the signature bloc.]

_____ The parties engaged in settlement discussions and as of this date, the parties have reached a settlement (*even if the paperwork to memorialize the settlement remains to be completed*). (*If this box is checked, the parties are on notice that they must SEPARATELY file either a contemporaneous stipulation of dismissal or a motion requesting that the court continue the stay in this case until a specified date upon which they will file a stipulation of dismissal.*)

_____ The parties engaged in settlement discussions and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the court of its intent to proceed with this action.

_____ The parties have not engaged in settlement discussions and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

None of the above three statements fully describes the status of this case. Contemporaneously with the filing of this report, the Office of the Attorney General of the State of Nevada is filing a separate document detailing the status of this case.

Submitted this _____ day of _____, _____ by:

Attorney Name: _____

Print
Signature

Address: _____ Phone: _____
 _____ Email: _____